
IN THE
SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI

No.: 2014-CA-00585

STEVEN JACOB MAHAFFEY

APPELLANT

v.

WILLIAM CAREY UNIVERSITY

APPELLEE

APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

Oral Argument is Requested

JOYCE FREELAND MBN 102183
FREELAND & FREELAND, LAWYERS
1013 JACKSON AVE
P.O. Box 269
OXFORD, MS 38655
(662) 234-3414

ATTORNEY FOR THE APPELLANT

TABLE OF CONTENTS

I.	The Statement of Issues in Mr. Mahaffey’s brief fully complies with Rules 10(b)(4) and 28(a)(3) of the Mississippi Rules of Appellate Procedure.	3
II.	William Carey University’s brief cites and relies throughout on the University’s version of disputed facts, as if the Chancellor had conducted a trial, heard witnesses, and made findings of fact rather than ruling inappropriately on a motion for summary judgment despite the existence of material, disputed facts.	4
III.	Mr. Mahaffey is not judicially estopped; the position taken in this appeal that the University deviated from its standard procedures, ignored its handbook, and did not act with “fundamental fairness” in dismissing Mr. Mahaffey is totally consistent with the position taken on Mr. Mahaffey’s cross-motion for summary judgment.	6
IV.	Oral argument is appropriate in this matter to make it more clear where the parties disagree on material facts and law.	8
CONCLUSION		9
CERTIFICATE OF SERVICE		11

TABLE OF AUTHORITIES

Cases

<u>Beauchene v. Mississippi College</u> , 986 F.Supp.2d 755 (S.D. Miss. 2013), <u>appeal dismissed</u> (5 th Cir. 2014).....	8
<u>Broadhead v. Bonita Lakes Mall Ltd. Partnership</u> , 702 So.2d 92 (Miss. 1997)	3
<u>In re Estate of McLemore v. McLemore</u> , 63 So.3d 468 (Miss. 2011)	6
<u>Olier v. Bailey</u> , --- So.3d --- (Miss. 2015)	4, 5
<u>Pursue Energy Corp. v. Mississippi State Tax Comm’n</u> , 968 So.2d 368 (Miss. 2007)	7
<u>Senu-Oke v. Jackson State University</u> , 521 F.Supp.2d 551 (S.D. Miss. 2007)	8

Rules

Miss. R. App. P. 10(b)(4)	3, 4, 9
Miss. R. App. P. 28(a)(3)	3, 4, 9
Miss. R. Civ. Pro. 56(c)	6

I. The Statement of Issues in Mr. Mahaffey’s brief fully complies with Rules 10(b)(4) and 28(a)(3) of the Mississippi Rules of Appellate Procedure.

William Carey University complained in its brief that the Statement of Issues in the brief of Mr. Mahaffey differs from the Statement of Issues as initially filed in this appeal. William Carey University asked that this Court strike or refuse to consider issues 3, 4, 5, 6, and 7.

Issues 3, 4, 5, 6, and 7 in Mr. Mahaffey’s brief refine and expand on Issues 3, 4, and 5 as set out in the Statement of Issues required to be filed under Miss. R. App. P. 10(b)(4). The Statement of Issues as filed on May 2, 2014 is attached hereto as **Exhibit A**.

Those issues as originally filed and as set out in Mr. Mahaffey’s appeals brief deal with the failure of the Chancellor to consider whether the University, a private institution, in dismissing Mr. Mahaffey, a third year medical student (a) deviated from its established procedures; (b) did not follow its handbook; and (c) did not act in “fundamental fairness” as required under applicable precedent for a dismissal of a student by a private university.

Regardless, it is well established that even a failure to list a claim in the statement of issues on appeal “does not waive or preclude inclusion of the claim in an appellate brief.” **See, e.g., Broadhead v. Bonita Lakes Mall Ltd. Partnership**, 702 So.2d 92 (Miss. 1997).

As explained in **Broadhead**, the comment to Rule 10 of the Mississippi Rules of Appellate Procedure expressly provides that the designation of certain issues under

Rule 10(b)(4) “does not preclude a party from stating other issues in its brief under Rule 28(a)(3).”

The issues as stated in Mr. Mahaffey’s brief fully comply with the requirements of Rules 10(b)(4) and 28(a)(3) and should be considered on their merits in this appeal.

II. William Carey University’s brief cites and relies throughout on the University’s version of disputed facts, as if the Chancellor had conducted a trial, heard witnesses, and made findings of fact rather than ruling inappropriately on a motion for summary judgment despite the existence of material, disputed facts.

It is well-established here that the medical student, Mr. Mahaffey, and William Carey University, have diametrically opposed views of the incidents cited by the University as grounds for dismissal based on professionalism and/or academic reasons.

Rule 56 of the Mississippi Rules of Civil Procedure is extremely clear – when there is even one “genuine issue as to any material fact,” summary judgment should be denied. **See** Miss. R. Civ. P. 56(c). In considering a summary judgment motion, every disputed fact must be considered “in the light most favorable” to the non-movant, here, Mr. Mahaffey. **See, e.g., Olier v. Bailey**, --- So.3d --- (Miss. 2015) at ¶ 9 (quoting Miss. R. Civ. P. 56(c)).

The University’s appeals brief cites and relies throughout on references to disputed issues of material fact as if this were an appeal of findings of fact by the Chancellor after a full hearing with testimony by witnesses rather than an appeal of a summary judgment inappropriately granted.

For example, on pages 5 - 6 and page 18, the University's brief relies on a nurse's unfavorable description of an attempt by Mr. Mahaffey to scrub-in and shadow surgery that is completely refuted – for purposes of the University's summary judgment motion – by an affidavit of the surgeon involved. (R000626-000627, Records Excerpts Tab 6).

On pages 10, 11, 16, 18, and 20 of the University's brief, it argues that summary judgment was proper based on the view of Dr. Chard, a practicing pediatrician supervising a rotation by Mr. Mahaffey, that his pediatrics logs were "falsified" or "fabricated." This issue is clearly material to the dismissal of Mr. Mahaffey, and it is a disputed issue of fact.

The record before the Chancellor included Mr. Mahaffey's explanation that the coding system being used by William Carey University's new school of osteopathic medicine included only 100 or so potential codes for procedures which did not fit pediatrics well, while Dr. Chard was used to a system used by hospitals that has more than 10,000 codes for procedures. (See R 000625 and R 000684-000691).

In considering a summary judgment motion, the court cannot pick and choose which version of material incidents it chooses to credit. It must choose the version presented by the non-movant, here, Mr. Mahaffey. **Olier v. Bailey**, --- So.3d --- (Miss. 2015) at ¶ 9.

If there is doubt on even one disputed issue of fact – with the attempt to scrub-in for surgery and the coding difficulties for Mr. Mahaffey's pediatrics logs

being two such examples, each of which is clearly material to whether Mr. Mahaffey should have been expelled or allowed to complete his study of medicine – summary judgment should be denied. See Miss. R. Civ. Pro. 56(c).

III. Mr. Mahaffey is not judicially estopped; the position taken in this appeal that the University deviated from its standard procedures, ignored its handbook, and did not act with “fundamental fairness” in dismissing Mr. Mahaffey is totally consistent with the position taken on Mr. Mahaffey’s cross-motion for summary judgment.

The University argues that Mr. Mahaffey should be judicially estopped from arguing in this appeal that there are genuine issues of material fact concerning his dismissal, because he filed a cross-motion for summary judgment.

Judicial estoppel turns on whether a litigant is “taking a position at odds” with a position that he has taken before. In re Estate of McLemore v. McLemore, 63 So.3d 468, 491 ¶ 71 (Miss. 2011). In the McLemore case, an executor of the estate was judicially estopped from asserting on appeal that his co-executor should not receive any compensation where at trial he asked for fees to be split equally between himself and the co-executor.

In this case, both before the Chancellor and in this appeal, Mr. Mahaffey has consistently taken the position (both in responding to the University’s motion for summary judgment and in arguing in support of a cross-motion for summary judgment) that his dismissal was a breach of his implied contract with William Carey University, because the University (a) deviated from its standard procedures; (b) ignored its handbook; and (c) did not act with “fundamental fairness” in dismissing him.

The case cited by the University in support of its judicial estoppel argument has an unusual procedural posture – it is an appeal to chancery court of a determination by the Mississippi State Tax Commission that a company owed more than \$300,000 in sales or use tax for gas it produced but used in producing other gas for sale. **See Pursue Energy Corp. v. Mississippi State Tax Comm’n**, 968 So.2d 368 (Miss. 2007).

The inconsistent position taken by Pursue Energy Corp. was on whether a summary judgment procedure rather than a hearing was appropriate on the appeal to the Chancellor. In chancery court, the company took the position that there was no genuine issue of material fact and that a summary judgment proceeding was appropriate. On the appeal to the Mississippi Supreme Court, the company attempted to argue that summary judgment was not the appropriate way to proceed at the first appeal level, because there were genuine issues of material fact. The Supreme Court held, with reason, that the company could not accede to the chancellor’s proceeding without a hearing at the first appeals level then take an inconsistent position in the company’s appeal to the Supreme Court.

The **Pursue Energy** case is a very different situation from the situation here. Mr. Mahaffey’s position that the University did not act with “fundamental fairness” has been consistent on every motion and at every level of this proceeding.

IV. **Oral argument is appropriate in this matter to make it more clear where the parties disagree on material facts and law.**

William Carey University has consistently cited as controlling here **Beauchene v. Mississippi College**, 986 F.Supp.2d 755 (S.D. Miss. 2013), **appeal dismissed** (5th Cir. 2014), since it involves an expulsion decision by a private college. Despite the fact that **Beauchene** confirms that Mississippi law recognizes an implied contractual relationship between a private university and its students, **Beauchene v. Mississippi College**, 986 F.Supp.2d at 769, the University continues to argue in its recent brief that no contract was created between the University and Mr. Mahaffey due to a self-serving statement in the handbook.

The University's argument ignores both the clear holding in **Beauchene** that the contractual relationship is implied and the well-accepted principle that every contract has an implied obligation of "good faith" and "fair dealing" under Mississippi law.

In the University's recent brief, it also cites "language" in **Senu-Oke v. Jackson State University**, 521 F.Supp.2d 551 (S.D. Miss. 2007), for the concept that "informal give and take" is sufficient to demonstrate "fundamental fairness" as if that language is definitive here. The University's brief does not explain that **Senu-Oke** was a case where an applicant to a public university's Ph.D. program raised federal claims – denial of due process and other Section 1983 claims – as well as state law claims for breach of contract by the university. The **Senu-Oke** decision held that since all federal claims failed, the case should be returned to state court on the state law claim of breach of implied contract. The "informal give and take" phrase is used

in passing but was never interpreted or applied by the Senu-Oke court. That phrase was irrelevant to the court's determination that the federal claims should be dismissed.

In another example, the University's brief claims that the Chancellor held that the University had followed its handbook and other procedures. In fact, a reading of the Chancellor's announcement of the reasoning for his ruling from the bench reveals that (a) he never discusses or indicates he was aware of the standard procedures at William Carey University that allow medical students to appeal a failing grade and require three failing grades before expulsion (Records Excerpts Tab 3); and (b) Mr. Mahaffey's deposition confirmed that he understood that the probation letter put him on "zero tolerance" status subject to being expelled only for violation of "the four recommendations ultimately described in the probation letter," which the parties do not agree occurred here and the record confirms were not the basis for the expulsion. (Records Excerpts Tab 3, p. 46).

Oral argument would highlight how the legal standard under Beauchene should have been applied here and help eliminate extraneous arguments about whether or not there is an implied contractual relationship between a student and a private university under Mississippi law from the matters before the Court.

CONCLUSION

In response to issues raised in the University's brief: (1) the Statement of Issues in Mr. Mahaffey's brief complies fully with Rules 10(b)(4) and 28(a)(3) of the Mississippi Rules of Appellate Procedure, and all of those issues should be

considered on their merits; (2) a continued recitation of the University's view of material disputed facts does not address the absolute requirement under Rule 56(c) that on summary judgment the view of the student as the non-movant must be taken as true; (3) the concept of judicial estoppel does not apply here, because Mr. Mahaffey has consistently taken the same position on all motions and at the trial as well as the appellate level that the University's actions deviated from its standard procedures, ignored its handbook, and did not demonstrate "fundamental fairness" in dealing with him; and (4) oral argument is appropriate here to require a simple and clear presentation to the Court of where and how the parties disagree on material facts and law.

Respectfully submitted, this the 23rd day of April, 2015.

s/Joyce Freeland

Joyce Freeland

Mississippi Bar No. 102183

FREELAND & FREELAND, LAWYERS

1013 Jackson Avenue

P.O. Box 269

Oxford, Mississippi 38655

Telephone: (601) 234-3414

Facsimile: (662) 234-0604

Email: joyce@freelandlawfirm.com

ATTORNEY FOR STEVEN JACOB MAHAFFEY

CERTIFICATE OF SERVICE

I, Joyce Freeland, attorney for appellant, Steven Jacob Mahaffey, hereby certify that I have this day served a copy of the above and foregoing by sending a true and complete copy via this Court's MEC system or via United States mail, postage prepaid, to:

The Honorable M. Ronald Doleac
Forrest County Chancery Court
P.O. Box 872
Hattiesburg, MS 39403-0872

Heber Simmons III, Esq.
Seth Hall, Esq.
Simmons Law Group, P.A.
240 Trace Colony Park Drive, Suite 200
Ridgeland, MS 39157
heber@simmonslawgroup.com
seth@simmonslawgroup.com

Dorrance Aultman, Esq.
Aultman, Tyner & Ruffin, Ltd.
P.O. Drawer 750
Hattiesburg, MS 39403-0750
da@aultmanlaw.com

This the 23rd day of April, 2015.

s/Joyce Freeland
Joyce Freeland

FILED

MAY 12 2014

IN THE CHANCERY COURT OF FOREST COUNTY, MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STEVEN JACOB MAHAFFEY

PLAINTIFF

V.

MAY 02 2014

CIVIL ACTION NO. 2013-0523-GN-DO

WILLIAM CAREY UNIVERSITY

DEFENDANT

Jimmy C. Hard
Chancery Clerk

PLAINTIFF'S M.R.A.P. 10(B)(4) STATEMENT OF ISSUES

Steven Jacob Mahaffey, Appellant, by counsel, files this his Statement of the Issues, pursuant to M.R.A.P. 10(b)(4), and states that the issues he intends to present on the appeal include the following:

1. Whether the trial court abused its discretion in determining that no genuine issue of material fact existed in granting William Carey University's Motion for Summary Judgment.
2. Whether the trial court was manifestly wrong in granting summary judgment against Mahaffey, despite genuine issues of material fact.
3. Whether the trial court abused its discretion in finding that William Carey University did not deviate from its established procedures in disciplining and dismissing Mahaffey.
4. Whether the trial court erred and abused its discretion in holding that William Carey University had followed its handbook in dismissing Mahaffey.
5. Whether the trial court abused its discretion in finding that William Carey University's dismissal of Mahaffey was carried out with fundamental fairness.

EXHIBIT A

Respectfully submitted this 2nd day of May, 2014.

STEVEN JACOB MAHAFFEY



DANIEL M. WAIDE, MSB #103543

SAMUEL S. McHARD, MSB #100295
DANIEL M. WAIDE, MSB #103543
McHARD & ASSOCIATES, PLLC
15 MILBRANCH ROAD
HATTIESBURG, MS 39402
T: 601-450-1715; F: 601-450-1719
smchard@mchardlaw.com

CERTIFICATE OF SERVICE

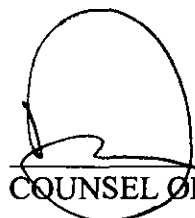
I, Daniel M. Waide, certify that I have this date forwarded a true and correct copy of the foregoing to the following:

Honorable Judge M. Ronald Doleac
Forrest County Chancery Court
P.O. Box 872
Hattiesburg, MS 39403-0872

Heber Simmons III, Esq.
Seth Hall, Esq.
Simmons Law Group, P.A.
240 Trace Colony Park Drive, Suite 200
heber@simmonsllawgroup.com
seth@simmonsllawgroup.com

Dorrance Aultman, Esq.
Aultman Tyner and Ruffin
P.O. Drawer 750
Hattiesburg, MS 39403-0750
da@aultmantyner.com

This the 2nd day of May, 2014.


COUNSEL OF RECORD

SAMUEL S. McHARD, MSB #100295
DANIEL M. WAIDE, MSB #103543
McHARD & ASSOCIATES, PLLC
15 MILBRANCH ROAD
HATTIESBURG, MS 39402
T: 601-450-1715; F: 601-450-1719
smchard@mchardlaw.com